



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 16, 2003

Mr. Don Rogers  
Communications Director  
Texas Department of Mental Health & Mental Retardation  
P.O. Box 12668  
Austin, Texas 78711-2668

OR2003-7393

Dear Mr. Rogers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189478.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for the personnel file of one of its employees.<sup>1</sup> You claim that some of the requested information is excepted from disclosure under section 552.102 of the Government Code.<sup>2</sup> We have considered the exception you claim and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26

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<sup>1</sup>You inform us that the requestor amended his request, which initially encompassed the employee file and other information, to include only the employee's personnel file.

<sup>2</sup>You also seek to withhold some of the submitted information under section 552.024. We note, however, that section 552.024 is not an exception to public disclosure under chapter 552 of the Government Code. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

U.S.C. § 6103(b)(2). The department must withhold the W-4 form that we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

The department claims that some of the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" This exception is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy test under section 552.102(a) is the same as the test of common-law privacy under section 552.101 of the Government Code. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Therefore, we will address the department's privacy claim under section 552.101.

Section 552.101 also encompasses the common-law right to privacy. Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common-law right to privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

The common-law right to privacy also protects certain types of personal financial information. This office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state, and the basic facts about that transaction are not protected by common-law privacy. *Id.* at 9.

In this instance, the submitted information relates to an employee of the department. As this office has often pointed out, the public has a legitimate interest in information that relates to the employment qualifications and official conduct of public officials and employees. We have marked the kinds of personal financial information that are protected by the common-law right to privacy and thus must be withheld under section 552.101, provided that none of the marked information relates to a transaction that is funded in whole or in part by a governmental body. We also have marked a small amount of other private information that you must withhold under section 552.101. We conclude that none of the remaining information is excepted from disclosure under section 552.101 in conjunction with common-law privacy. *See also* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public).

The department also raises section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the department received this request for information. The department may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election to keep the information confidential. You state, and have submitted documentation reflecting, that the submitted information relates to an employee who timely elected under section 552.024 to keep his home address and telephone number, social security number, and family member information confidential. Therefore, the department must withhold those types of information, which we have marked, under section 552.117(a)(1).

The submitted documents also contain Texas driver's license information. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.] Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the department must withhold under section 552.130(a)(1).

Lastly, we note that some of the submitted information is copyrighted. An officer for public information must comply with the copyright law and is not required to furnish copies of

records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the department must withhold the employee's W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department also must withhold the submitted information that is protected by common-law privacy under section 552.101. The employee's home address and telephone number, social security number, and family member information are excepted from disclosure under section 552.117(a)(1). The Texas driver's license information is excepted from disclosure under section 552.130. The department must release the rest of the submitted information, complying with copyright law in doing so.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

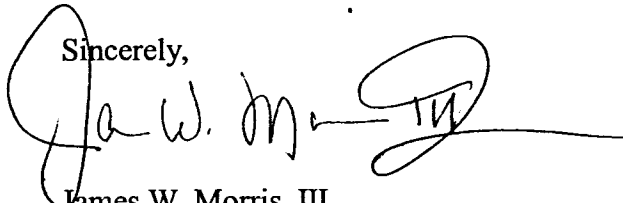
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 189478

Enc: Submitted documents

c: Mr. Jason Curry  
c/o Mr. Don Rogers  
Texas Department of Mental Health & Mental Retardation  
P.O. Box 12668  
Austin, Texas 78711-2668  
(w/o enclosures)